

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT



GEORGE VENESS,

Plaintiff,

vs.

Case No. 2004-4347-NO

TOWN CENTER DEVELOPMENT, LLC,  
D&T CONSTRUCTION COMPANY and  
MOUNTAIN SERVICE CORPORATION,  
jointly or severally,

Defendants.

OPINION AND ORDER

Defendants D&T Construction Company ("D&T") and Mountain Service Corporation ("Mountain Service") have filed a motion for summary disposition, with which defendant Town Center Development, LLC ("Town Center"), concurs. Town Center has also filed a separate motion for summary disposition.

Plaintiff filed this complaint on October 15, 2004, filed an amended complaint June 30, 2005, and filed a second amended complaint on November 9, 2005. Plaintiff alleges that, on April 7, 2004, defendants D&T and Town Center entered into a written subcontractor agreement with SGI Construction, Inc. ("SGI"), under which SGI was to install vinyl siding on a new construction project. Plaintiff alleges that Mountain Service acted as an agent of D&T and Town Center with respect to this construction project. Plaintiff claims that he was an hourly employee of SGI at the time. Plaintiff alleges that, on April 18, 2004, he was working on this project while standing on a high platform or



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balcony which lacked appropriate guard railings. Plaintiff alleges that his gear became entangled and he lost his balance, falling headfirst to the ground and sustaining severe and permanent injuries. Among other injuries, plaintiff claims to have suffered permanent, total paralysis from the neck down. Plaintiff brings counts for negligence, premises liability, *nuisance per accidens*, breach of third party beneficiary contract, and *respondeat superior*.

The pending motions for summary disposition have been brought under MCR 2.116(C)(8) and (C)(10). Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party "has failed to state a claim on which relief can be granted." *Radtko v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). All factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992); *Cork v Applebee's Inc*, 239 Mich App 311, 315-316; 608 NW2d 62 (2000).

A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for the plaintiff's claim. *Arias v Talon Development*, 239 Mich App 265, 266; 608 NW2d 484 (2000). In evaluating a motion brought under this subrule, the Court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Spencer v Citizens Ins Co*, 239 Mich App 291, 299; 608 NW2d 113 (2000). When the proffered

evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.*

First, the Court shall address D&T and Mountain Service's motion for summary disposition, along with Town Center's concurrence. In support of this motion for summary disposition, defendants argue that plaintiff has proffered no evidence in support of his allegation that defendants are liable for negligence under the common work area doctrine. They aver that plaintiff's claim for breach of a third party beneficiary contract must fail since plaintiff cannot produce any admissible evidence of a contract between Town Center and D&T. Alternatively, they urge that a plaintiff is not a third party beneficiary of the alleged contract since defendants did not undertake the contract directly for plaintiff's benefit. They argue that plaintiff's *nuisance per accidens* claim must fail since he has not alleged facts under which a nuisance could possibly be found to exist, and since he himself created the situation which caused his injury. Finally, they argue that plaintiff's claims for premises liability must be dismissed since premises liability is not available as a theory of recovery against a general contractor.<sup>1</sup>

In response, plaintiff argues that defendants are liable for negligence under the common work area doctrine.<sup>2</sup> Plaintiff asserts that there was an oral contract between Town Center and D&T, of which he was an intended third party beneficiary. Plaintiff avers that this contract may be established despite the lack of a writing, since part

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<sup>1</sup> Defendants do not address plaintiff's claims for *respondeat superior*.

<sup>2</sup> Specifically, plaintiff claims that D&T conclusively admitted that it retained control of the construction project. Plaintiff argues that there is no question that D&T and Town Center exercised supervisory and coordinating authority over this project. Plaintiff avers that an area will be a common work area as long as one or more trade will eventually work in the area. Plaintiff asserts that the risk of injury posed by the lack of railings was readily observable and avoidable. Plaintiff also asserts that the lack of railings posed a high degree of risk to a significant number of workers.

performance is evidence of the underlying agreement. Plaintiff argues that the existence of a *nuisance per accidens* is a question of fact. Lastly, plaintiff argues that his claim for premises liability cannot be dismissed since the danger posed by a high balcony without guard rails is unreasonably dangerous.

The Court shall first address defendants' requests for summary disposition of plaintiff's claims under the common work area doctrine. As a preliminary matter, the Court notes that D&T does not contest that it was the general contractor on the underlying project for purposes of this motion. In order to prevail on a claim based on the common work area doctrine, a plaintiff must prove that (1) a general contractor, or an owner who retains control over the project, failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that create a high degree of risk for a significant number of workers (4) in a common area. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 49; 684 NW2d 320 (2004). Essentially, "the common work area formulation . . . [attempts] to distinguish between a situation where employees of a subcontractor were working on a unique project in isolation from other workers and a situation where employees of a number of subcontractors were all subject to the same risk or hazard." *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 8; 574 NW2d 691 (1997).

During his deposition, plaintiff testified that numerous carpenters, roofers, plumbers, electricians and drywall installers had used the unguarded balcony on previous days. *Id.* at 85-86. He also testified that the superintendent, Dave Cantell, coordinated and directed the activities of at least three different groups of tradesmen working for different subcontractors. *Id.* at 88. However, plaintiff testified that on the day of his fall,

no one was working outside near the balcony apart from his fellow employees of SGI. Exhibit B to D&T and Mountain Service's Motion, Deposition of George Veness at 40-41. Plaintiff testified that Dave Cantell briefly visited the work site, but made no attempt to direct or control plaintiff's work. *Id.* at 43. Plaintiff also admits that he made the decision, entirely on his own, not to use the harness and other safety equipment that was provided to him. *Id.* at 39-40.

Upon careful review of all the documentary evidence presented, the Court finds that there is no genuine issue of material fact precluding summary disposition of plaintiff's claims under the common work area doctrine. Based on plaintiff's own deposition testimony, reasonable steps were taken to guard against the readily observable danger posed by the lack of guard rails on the balconies. The fact that plaintiff did not avail himself of the safety equipment provided cannot serve as a basis for his recovery in tort. Moreover, the lack of guard rails did not present a high risk of harm to a significant number of workers, especially in light of the safety equipment that was provided. Since plaintiff cannot satisfy all four elements of the common work area doctrine, the Court is satisfied that plaintiff's claims for negligence under this doctrine must fail as to all defendants.

The Court now turns to defendants' request for summary disposition of plaintiff's third party beneficiary claims. An individual is a third party beneficiary of a contract only where the contract establishes that the promisor has undertaken a promise directly to or for that individual. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 427-428; 670 NW2d 651 (2003). While neither party has been able to produce a written contract between D&T and Town Center regarding the construction project, the fact that D&T

was uncontrovertedly performing on the contract suggests that defendants had entered into some sort of contractual agreement. However, plaintiff has proffered no evidence suggesting that he was an *intended* third party beneficiary of the alleged contract between D&T and Town Center. As such, summary disposition of plaintiff's third party beneficiary claims must be granted as to all defendants in this matter.

Next, the Court shall address defendants' requests for summary disposition of plaintiff's nuisance claims. In his complaint, plaintiff specifies that his nuisance claim is for a private *nuisance per accidens*. A private nuisance is essentially an interference with another's "occupation or use of land or . . . with servitudes relating to land." *Adkins v Thomas Solvent Co*, 440 Mich 293, 303; 487 NW2d 715 (1992). The plaintiff in a private nuisance case must have "property rights and privileges in respect to the use or enjoyment interfered with." *Id.* at 304, quoting 4 Restatement Torts, 2d, §§ 821D-F, 822 at 100-115. The factual basis for plaintiff's nuisance claim is plaintiff's allegation that defendants failed to provide a guard rail on the balcony from which plaintiff fell. However, none of plaintiff's allegations suggest that he had a property right in the premises, or that the lack of a guard rail interfered with some other property right belonging to plaintiff. Therefore, the Court is satisfied that summary disposition of plaintiff's nuisance claims is warranted.

The Court now turns to defendants' request for summary disposition of plaintiff's claims for premises liability under MCR 2.116(C)(8). "The open and obvious doctrine is specifically applicable to a premises possessor," while "[t]he common work area doctrine . . . is not applicable to the premises possessor, but rather to a general contractor whose responsibility it is to coordinate the activities of an array of subcontractors." *Ghaffari v*

*Turner*, 473 Mich 16, 23; 699 NW2d 687 (2005). Since D&T acknowledges that it was the general contractor for purposes of this motion, plaintiff's premises liability claims against it must fail as a matter of law. The same would hold true for Mountain Service in its alleged capacity as D&T's agent or alter ego. Town Center, however, acknowledges that it was the owner of the premises, so its concurrence with the present motion for summary disposition pursuant to MCR 2.116(C)(8) is unavailing. However, its separate request for summary disposition of plaintiff's premises liability claims will be discussed subsequently.

Next, the Court shall address Town Center's separate motion for summary disposition. In support of its motion for summary disposition, Town Center admits that it owned the property in question, but argues that it did not retain sufficient control over the alleged common work area to be held liable under the common work area doctrine. Town Center also argues that the other elements of the common work area doctrine are inapplicable. Next, Town Center asserts that it is entitled to summary disposition of plaintiff's premises liability claims since it exercised neither possession nor control over the subject property. Town Center avers that it is also entitled to summary disposition of the premises liability claims based on the open and obvious doctrine. Lastly, as noted above, Town Center concurs with the motion for summary disposition brought by defendants D&T and Mountain Service.

Plaintiff retorts that Town Center is also a general contractor, according to Town Center's own admissions, and is thus liable under the common work area doctrine. Plaintiff claims that Town Center's own experts establish that it is at fault in this matter. Plaintiff avers that a question of fact exists as to whether he was an intended beneficiary

of the oral contract between Town Center and D&T. Plaintiff argues that balconies without guard rails were created and maintained by Town Center, and that there is no question that Town Center is thus liable for nuisance. Next, plaintiff urges that the unguarded balcony from which he fell was unreasonably dangerous condition, thereby subjecting Town Center to premises liability.

Summary disposition of plaintiff's claims for negligence under the common work area doctrine, for breach of third party beneficiary contract, and for nuisance *per accidens* is properly granted as to all defendants, for the reasons specified above. As such, the only request that has not already been granted to Town Center is for summary disposition of plaintiff's claims for premises liability.

Town Center acknowledges that it was the owner of the premises on which plaintiff was injured, but disputes whether it had possession and control of the premises at the time of plaintiff's injury. While it is not clear whether Town Center actually had possession and control of the property at the time of plaintiff's injury, resolution of this issue is unnecessary to the disposition of the present motion. A property owner is not liable where employees of contractors working on the owner's property fail to take necessary precautions against open and obvious dangers, *Perkoviq v Delcor Homes-Lakeshore Pointe, Ltd*, 466 Mich 11, 19; 643 NW2d 212 (2002), unless these open and obvious dangers possess special aspects rendering them unusually dangerous or effectively unavoidable. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 518-519; 629 NW2d 384 (2001).

There is no question that the danger posed by falling off of an unguarded balcony is open and obvious as a matter of law. The only question is whether this open and

obvious condition possessed special aspects. In the case at bar, plaintiff has proffered no documentary evidence suggesting that the danger of falling off the balcony was effectively unavoidable. Furthermore, the risk of falling off of a second floor balcony is not the sort of danger which poses an unusually high risk of severe bodily injury or death. As such, the Court is satisfied that Town Center is entitled to summary disposition of plaintiff's claims for premises liability.

Finally, the Court turns to plaintiff's claims for *respondeat superior*. As noted above, defendants do not specifically address these claims. However, *respondeat superior* is not a separate cause of action, but rather a basis for holding an employer liable for the acts of its servant. Since summary disposition of plaintiff's substantive claims is warranted in this matter, summary disposition of plaintiff's claims for *respondeat superior* is also appropriate.

For the reasons set forth above, summary disposition of plaintiff's claims for negligence under the common work area doctrine, for breach of third party beneficiary contract, for nuisance *per accidens*, for premises liability, and for *respondeat superior* is GRANTED in favor of all defendants. Plaintiff's claims are DISMISSED. Pursuant to MCR 2.602(A)(3), this Opinion and Order resolves the last pending claim and closes this case.

IT IS SO ORDERED.

Dated: August 7, 2006

CC: Joseph Dedvukaj  
Jeffrey Bullard  
William D. Shailor

DONALD G. MILLER  
Circuit Court Judge

DONALD G. MILLER  
CIRCUIT JUDGE

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